No. 59

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, *Appellant*,

v.

HENRY ROMPEL, JR.,
ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED, *Appellee*.

APPELLEE'S PETITION FOR REHEARING

GROVER SELLERS,
Attorney General, State of Texas
(Amicus Curiae)

BOYLE, WHEELER & GRESHAM,

BAKER, BOTTS, ANDREWS & WHARTON,
HUTCHESON, TALIAFERRO & HUTCHESON

THOMPSON, KNIGHT, HARRIS, WRIGHT & WEISBERG,

WEEKS, BIRD & CANNON,

Of Counsel

MARK V. FUCHS,
New Braunfels, Texas
(Attorney for Administrator)

RUPERT N. GRESHAM,
San Antonio, Texas

PALMER HUTCHESON,
Houston, Texas,

J. PAUL JACKSON,
Dallas, Texas

HARRY C. WEEKS,
Fort Worth, Texas
(Estate Tax Committee of Texas State Bar)

Attorneys for Appellee

January 25, 1946

SUBJECT INDEX

	PAGE
GROUNDS FOR REHEARING	2
SCOPE OF THE COURT'S HOLDING	4
ARGUMENT	11
CONCLUSION	38

CITATIONS

CASES:

Arnett v. Reade, 220 U.S. 311	14
Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799	13, 30
Castleberry, W. M., Independent Executor of Estate of Tillie Castleberry, Deceased, v. W. A. Thomas, Collector, No. 1396, Civil Docket, District Court of the United States for the Northern District of Texas, Dallas Division	29
Chandler v. Alamo Manufacturing Co., 140 S.W. (2d) 918	34
Depas v. Mayo, 11 Mo. 314	23
Dimock v. Corwin, 306 U.S. 363	24
Fernandez, Collector, v. Wiener, Docket No. 58	2, 4, 5, 27
Hawkins v. Britton State Bank, 122 Tex. 69, 52 S.W. (2d) 243	34
Helvering v. O'Donnell, 303 U.S. 370	21
Hoeper v. Tax Commission, 284 U.S. 206	7, 27
Hopkins v. Bacon, 282 U.S. 122	28
Kerr v. Tyler Guaranty State Bank, 33 S.W. 601	33
Knowlton v. Moore, 178 U.S. 41	27
Moffitt v. Kelly, 218 U.S. 400	15, 16, 18, 34
Poe v. Seaborn, 282 U.S. 101	17, 18
Pottorff v. J. D. Adams Co., 70 S.W. (2d) 745	34
Reinecke v. Northern Trust Co., 278 U.S. 339	14, 22, 37

PAGE

Tyler v. United States, 281 U.S. 497 24
United States v. Goodyear, 99 Fed. (2d) 523 (C.C.A. 9) 14
United States v. Jacobs, 306 U.S. 363 24
United States v. Robbins, 269 U.S. 315 18
Warburton v. White, 176 U.S. 484 13
Whitney v. Tax Commission, 309 U.S. 530 21

CONSTITUTION AND STATUTES:

Revenue Act of 1942:
Sec. 811(e)(2) 2, 3, 4, 11, 19
Sec. 1000(d) 19
9 Statutes at Large, p. 108 31

Constitution of Texas:
Article VII, Section 19 30
Article XVI, Section 15 30
Article XVI, Section 18 31

MISCELLANEOUS:

Gammel's Laws of Texas, Vol. 3, p. 77 38
Gammel's Laws of Texas, Vol. 2, p. 177 38
Gammel's Laws of Texas, Vol. 2, p. 1225 31
Restatement of Conflicts of Laws, Secs. 292 and 293 23
Boyer's Succession, 118 La. 212, 42 So. 778 36
Vernier's American Family Laws, Vol. III, pp. 355-368 10

No. 59

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, *Appellant*,

v.

HENRY ROMPEL, JR.,
ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED, *Appellee*

APPELLEE'S PETITION FOR REHEARING

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Appellee herein, as representative of the Estate of Ernst Herbst, Deceased, respectfully petitions that a rehearing be granted in this case and that upon such rehearing the judgment of this Court, reversing the judgment of the Court below, be set aside and that judgment be affirmed.

In the alternative Appellee prays that the Court set the case down for reargument before a full Bench, this case having been originally submitted with only eight of the

justices present and involving constitutional questions of great importance and public interest, embraced in a "test case" (along with the case of FERNANDEZ, COLLECTOR, v. WIENER, Docket No. 58, from Louisiana simultaneously submitted and decided) as to the application of the Federal Estate Tax to State rules of property, such as prevail in Texas and seven other states having traditional community property laws.

In this connection Appellee submits that even if the Court's decision is considered correct so far as the law applies to a husband's estate, the Court should be presented with full argument as to the applicability and validity of the law in the instance of the estate of a wife who predeceases her husband, as hereinafter discussed.

Grounds for Rehearing

As grounds for this Petition your Petitioner submits:

I.

This Honorable Court erred in reversing the judgment of the District Court of the United States for the Western District of Texas, and erroneously held that Section 811 (e) (2) of the INTERNAL REVENUE CODE, as amended by the Revenue Act of 1942, violated neither the due process clause of the Fifth Amendment, the requirement that excises be levied with geographic uniformity, the requirement that direct taxes be apportioned, nor the provisions of the Tenth Amendment forbidding federal invasion of the powers reserved to the several States.

II.

This Honorable Court erred in holding, in a case involv-

ing only the estate of a deceased husband, that (though the Statute involved was inseparable and undertook also to impose a like tax in the event of the prior decease of a wife) the tax upon the interest of the wife in community property on the death of the husband could be upheld because of the termination of his control and power of disposition, and the tax upon the interest of the husband in community property upon the death of the wife could be upheld because she has a remedy for an alienation made in fraud of her rights by her husband.

III.

This Honorable Court erred in holding that Section 811 (e) (2) of the REVENUE ACT OF 1942 had the effect of imposing an Estate Tax on the estate of whichever spouse died first (upon the grounds stated in the preceding assignment) because the section does not purport to impose the tax upon termination of powers of control or disposition on the one hand, or restraints on alienation on the other hand, but expressly imposes the tax "to the extent of the interest therein held as community property by the decedent and surviving spouse," with certain enumerated exceptions, thus clearly imposing the tax in all instances without reference to termination of powers of control or disposition, or restraints on alienation.

IV.

This Honorable Court erred in placing the above construction on Section 811 (e) (2) for the purpose of sustaining its constitutionality since there was no basis in the law therefor, and since amendments of the State Law as to control would

govern the impact of the Federal Tax; if the tax is to be so applied, in disregard of the language of the Federal Law.

V.

This Honorable Court erred in construing Section 811 (e) (2) as imposing an Estate Tax on each spouse's estate where community property is involved, without requiring consideration of the *full* economic contribution of the respective spouses, personally, to the accumulation of such Estate.

VI.

This Honorable Court erred in holding Section 811 (e) (2) to be constitutional without construing the prescribed exception from the gross estate of a deceased spouse to embrace within its scope not only wages and salaries, but all other earnings and economic contributions of the surviving spouse, whether professional, or from business, or manual labor.

Scope of the Court's Holding

This Court recognized that in Texas husbands and wives were the joint and equal owners of all community property.[1] The Court further recognized that the amending section involved here was inseparable, so that if it was invalid in any aspect when applied to the estate of a decedent wife, it was wholly invalid and could not be applied in the case at bar, where the husband was the first to die. The Court, although cognizant of the fact that in many cases an estate tax meas-

[1] In this and succeeding portions of this argument, references will be made primarily to the opinion of the Court in No. 58 **(Fernandez v. Wiener)** because the principal opinion of the Court in the two test cases was delivered in No. 58, but was, by the brief opinion in No. 59, made applicable to it.

ured by the entire community property would exceed the decedent's one-half thereof, upheld the validity of the lien which the statute purports to grant upon all community property to secure the payment of the tax; brushed aside the question of how that burden was to be borne, and left the matter of apportioning the burden to the State having jurisdiction of the administration upon the decedent's estate. This holding, we assume, was made with full cognizance of the fact that if the decedent had no property other than his or her interest in the community estate, any right of reimbursement granted to the survivor would be valueless in those cases where the total tax exceeded the decedent's one-half of the community property.

The Court, in the opinion in No. 58, summarized the wife's right to interfere with the husband's management of that portion of the community property committed to his management, as follows:

> "* * * As we said of Texas community property in Hopkins v. Bacon, 282 U.S. 122, 126, the authorities hold 'that if the husband, as agent of the community, acts in fraud of his wife's rights, she is not without remedy in the courts. * * *' Appellee also concedes that 'excessive and capricious donations are void,' and that malicious or fraudulent intent need not be established in order that the wife shall have the remedies referred to. Appellee does not question that these are the rules generally applicable to community property in Texas."

The Court further recognized that it might generally be true "that *neither the husband nor wife gains any over-all financial advantage* when the other dies."

We think it implicitly, if not expressly, held in the opinion that the principles laid down do not depend for their applicability upon the fact that the decedent and the other

co-owner of the property were husband and wife. These principles are as applicable to property jointly owned by parties not so related as they are to property jointly owned by husband and wife.

The holding of the Court as to the validity of the statute, when considered with respect to the due process clause of the Fifth Amendment, is thus summarized.

> "It is enough that death brings about changes in the legal and economic relationships to the property taxed."

Considered in the light of the other statements of the Court heretofore dealt with, this is a holding that, if the survivor and the decedent jointly owned property and have dedicated all of that jointly owned property to a common enterprise and the decedent had during life the right to require that no part of the jointly owned property be diverted from the common enterprise, the termination of that right upon the decedent's death, whether or not it is of value, or irrespective of the extent of that value, is sufficient to render valid under the due process clause an estate tax levied upon the decedent's estate and measured by the entire value of the jointly owned property and collectible, to an indefinite extent, out of the survivor's share of the property.

In holding that the tax imposed by the Section under consideration in this case did not violate the uniformity clause of the Constitution, the Court disposed of all of the analogous situations pointed out by the appellee upon the ground that considerations of practical administrative convenience and cost in administration would justify singling out community property, and further said that the interests not taxed in such analogous cases are but "isolated specimens of the attorney's art, and likely to resist efforts to identify them with the taxable subject," although MR. JUSTICE

DOUGLAS and MR. JUSTICE BLACK apparently found more difficulty in conforming the Court's holdings to the constitutional requirement of uniformity.

As to the appellee's contention that the tax in some aspects was direct, the Court said:

> "* * * A tax imposed upon the exercise of some of the numerous rights of property is clearly distinguishable from a direct tax, which falls upon the owner merely because he is owner, regardless of his use or disposition of the property."

The applicability of the limitations contained in the Tenth Amendment were disposed of by holding that this Amendment did not limit the taxing power and that the Court could not inquire into the unexpressed motives or purposes of Congress.

Only in the specially concurring opinion delivered by MR. JUSTICE DOUGLAS was HOEPER V. TAX COMMISSION, 284 U.S. 206, referred to, but appellee's contention that a tax was invalid if levied upon A, but measured by the value of B's property, or if B's property was taken to pay A's tax, was disposed of with the statement:

> "* * * Since the levy is an excise and not a property tax, the case is not one of taking the survivor's property to pay the tax on decedent's estate."

Other portions of the opinion upheld the validity of a lien upon the survivor's property to pay the tax on decedent's estate and the quoted statement must have been made in full recognition of the fact that in many cases any right of reimbursement afforded by either state or federal law would be wholly valueless.

In dealing with the appellee's contention that the tax was

otherwise arbitrary and capricious, the Court made no reference whatsoever to the demonstrated fact that, although all of the property might be taxed as a part of the estate of one spouse, the survivor's one-half could, even if the survivor died immediately after the first decedent; be taxed as a part of the second decedent's estate; or, to the demonstrated fact that although all of the community property might be included in the decedent's estate, only one-half of the community debts are allowed as a deduction in computing the net estate (which will necessarily confiscate in many estates, large or small, the entire interest of the survivor, as well as the entire interest of the decedent) or to the demonstrated fact that the survivor's share of the property, although subjected to an estate tax was not granted an increased sale basis equal to estate tax values when any of that property was subsequently disposed of. Likewise, the Court found nothing arbitrary, capricious or confiscatory in imposing a tax levied upon the termination of a right with respect to property, which right might be *valueless or of insignificant value*, but measuring that tax by the entire *value* of the property.

The principles announced by the Court in this case would apparently render valid a death duty, measured in any of the following ways:

1. Upon the death of a partner in an ordinary partnership by the value of all partnership property, regardless of the value of the decedent partner's interest therein;

2. Upon the death of a Trustee whose death terminated the Trust, by the value of all of the Trust property, even though the Trustee did not at death have, and had never had, any beneficial interest therein;

3. Upon the death of the owner of a life estate, upon the

full value of the fee, even though the life tenant did not have at death, and had never had, any interest in the remainder;

4. Upon the death of a wife, resident of a State which gave her dower or similar rights in her husband's real estate, measured by the full value of that real estate.

Many other examples clearly within the scope of the opinion might be given, but we have endeavored to select only a few which could not, we are sure, be classified as "isolated specimens of the attorney's art," and which could easily be identified with the taxable subject.

Ordinary partnerships are clearly within the scope of the Court's opinion, because partnership property is jointly held; the partnership relation is terminated at the death of one partner; and this death brings about changes in the legal and economic relationships of all the members to the partnership property. These changes are at least as great as the changes which occur when the wife in a community property state dies and the husband's share of the community property is relieved of her right to require that all community property be used for the benefit of the community. The ordinary partner as well as a managing partner has at least that right under any conceivable partnership relation, and further in the ordinary partnership has an agency for the partnership and a right to deal with all of the partnership property, to pledge its credit and dispose of assets, much larger than the wife has with respect to the community property entrusted to her husband's management. At death, these rights terminate as to the whole property. So, the Court's holding would make valid a tax levied on the death of a partner who owned a 5% interest in a $20,000,000.00 partnership measured by the entire $20,000,000.00. This tax would exceed $13,000,000.00. The Court's opinion would uphold a lien upon the surviving partners' $19,000,000.00 worth of property to enforce the

payment of at least $12,000,000.00 of the tax, without regard to any right of reimbursement and without regard to whether the termination of the decedent's rights, with respect to the partnership property, was valuable to the survivors, or otherwise. Such a tax, this Court has definitely held, is not a tax upon the survivor's property, although the survivor's property must be taken to pay it. It is not arbitrary or capricious, this Court has said, even though it exceeds by tenfold any possible value which passed or shifted upon the happening of the excisable event, the death of a partner.

The applicability of what was said just above to the trustee-beneficiary and to the life tenant-remainderman situation, which are within the scope of this Court's opinion, is too clear to require restatement. But the dower situation, particularly in its applicability to the question of uniformity merits further discussion. Dower has been expressly abolished in only some fifteen (15) States, and in some of these States there are statutory substitutes therefor.[2] Generally speaking, in no State where dower remains can a husband dispose of his real estate without the joinder of his wife in such a manner as to cut off her right of dower therein. Such a right imposes an important restriction upon the husband's control of the property, which clearly constitutes more of a burden on his use and enjoyment thereof than do the wife's rights in Texas with respect to the husband's share of the community property. In states having dower, the wife must join, even though the transaction be advantageous, in order to convey full title. No such joinder or consent is required in Texas under similar circumstances, save only as to a homestead. The transaction must be fraudulent as to the wife, intentionally or otherwise, before she can intervene. Yet, in spite of all of the above, it has never been suggested that, upon the death of a wife in a State where she has such a right of

[2] **Vernier's American Family Laws**, Volume III. pages 355 to 368.

dower, all of her husband's real estate to which this right applies could be included in her gross estate, either with or without requiring the husband to contribute to the payment of such a tax. The opinion does not deny the right of Texas to adopt and continue in force its community property system. To the contrary, the specially concurring opinion recognizes the fairness of such a system. Nevertheless, the Court upholds the right of Congress to select incidents of that system as the occasion for a tax and holds that the fact that similar or more valuable incidents are terminated by the death of a spouse in another State without tax liability has no bearing either upon the question of uniformity or upon the question of whether or not the statute invades the admitted right of the State of Texas freely to select its own marital property system.

Argument

(Italics supplied for emphasis unless otherwise indicated.)

If Section 811(e) of the INTERNAL REVENUE CODE, as amended in 1942 by adding the phraseology in Section 811(e)(2) should read as the Court has construed it, the language would be substantially as follows:

> "Section 811(e)(2)—Community Interests—To the extent of the interest in community property of the decedent and surviving spouse, which under the laws of any state, territory or possession of the United States, or any foreign country, is under the *control* of the *decedent spouse*, immediately prior to death, or is subject to restraints on alienation which are terminated by the death of the *decedent spouse*."

That is not the way that the Statute reads. The subject of the tax, under the plain language of the statute, is all interest of the spouses in community property, taxable to whichever

spouse dies first, regardless of the existence of control in the hands of one, or restraint in behalf of the other; except such part as may be economically attributable to the surviving spouse within the scope of the prescribed exception, not, however, excepting more than one-half of the whole. The very statement of the exception in the statute proves the rule is applicable to all non-excepted property, entirely without reference to whether there exists either control, or restraint, on the part of the decedent spouse.

The opinion of the majority, expressed by the Chief Justice, uses on page 13 the following language:

> "Apart from the exemption, it is, as we have seen, the shifting at death of the incidents of the property, regardless of origin, which is the subject of the tax."

If so, it is the "unwritten law" which has been declared constitutional and not the written law which would apply if no "incidents of the property" shifted. Nor is it the intended law, as is reflected by the Congressional Report quoted from in Footnote 12 of the majority opinion in the Louisiana case. There it is pointed out that the so-called preferential treatment accorded to the community property states "is due to the fact that all of the property acquired by the *husband* after marriage, *through his own efforts*, in a community-property state is treated as if one-half belongs to the wife.

The words emphasized in the above quotation clearly reflect that Congress was only intending to deal with community property resulting from efforts of an individual spouse (the husband), and had no intention of making the tax applicable to other community property. Whether this intent may have failed by reason of the narrow language of the exception, such failure does not justify the adoption of a precisely contrary theory as the basis for sustaining the tax, on the balance of the whole estate.

The Supreme Court of Texas should be adequate authority as to the rules of property prevalent in this State, and as to the control of spouses over community property here. That Honorable Court in the case of ARNOLD v. LEONARD (114 Texas 535, 273 S.W. 799) said:

> "The Legislature, in defining the wife's rights in and to her separate property and property held in common with her husband, could lawfully deprive the husband of the power granted him for many years to manage and control the wife's *separate property and portions of the community* which were derived from the use of the wife's separate property or from her personal exertions, and could confine the management, control and disposition thereof to the wife alone and could exempt, not only her separate property, but said portions of the community from payment of the husband's debts."

If support is needed for the authority of the above statement, from any other source, it has been furnished by the Honorable Supreme Court of the United States through former CHIEF JUSTICE WHITE, who was an eminent authority on community property law of his native state, Louisiana, and presumably better acquainted with the fundamental conception in all states having community property laws, than lawyers or judges who have not practiced under that system. In the case of WARBURTON v. WHITE (176 U.S. 484) that eminent authority, speaking for this Court with the full concurrence of the full bench of the United States Supreme Court, said:

> "The Legislature could as well have provided that the wife could convey, as the husband; and if it had power to say that either could dispose of the community interest of the other, it could say that neither could do

so. Changing the manner of conveyance did not alter the status of ownership."

This declaration was supported in the case of ARNETT v. READE, 220 U.S. 311, in which case the opinion of this Honorable Court was written by that eminent common law authority, MR. JUSTICE HOLMES.

We have also in support of our position that "control" is not property or an interest therein, and that the shifting of control is not therefore a taxable event, the language and decision of the present Chief Justice of the Court. In the case of REINECKE v. NORTHERN TRUST COMPANY, 278 U.S. 339, this Honorable Court speaking through the Honorable Chief Justice, said, with reference to the taxability of five trusts (wherein the Settlor had reserved the several powers of supervision, voting, control and appointment) "nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. * * * The shifting of the *economic interests* in the trust property which was the subject of the tax was thus complete as soon as the trust was made."

As said in the case of UNITED STATES v. GOODYEAR, 99 Fed. (2d) 523 (C.C.A. 9):

> "The terms 'management and control' are not synonymous with 'possession and enjoyment' * * * illustrated by the situation where an agent manages real property for the owner."

That the mere control and management of property for another, whether the other party be a co-owner in the same property or otherwise, is not a taxable interest, and that the shifting thereof is not an excisable event under the Federal Estate Tax, or within the taxing power of the United States,

was thought to have been authoritatively settled by the Honorable Chief Justice, when, as Attorney General of the United States, he stated that:

> "From the standpoint of a public officer, acting judicially, * * * considering those *principles which must govern the incidence of a Federal Taxing Statute upon a subject matter which is the creation of State Law*, I am unable to find those considerations which would, in my opinion, justify the Government in beginning anew in some other case a juridical controversy which was litigated to a final conclusion in Blum v. Wardell (276 Fed. 226) and in which the Government's position was fully presented." (34 Opinions, Attorney General, 395, and Treasury Decision 3670).

In that opinion it was further said:

> "If the widow takes by virtue of her ownership in community property, which is held by the community *subject only to the power of disposition of the husband*, obviously the Estate Tax has no application."

The limitations expressed by the Honorable Attorney General in that opinion with relation to the Federal Taxing powers could not, of course, be considered to have been made unadvisedly. The opinion makes specific reference to the fact that under the Revenue Act of 1921 "the officials of the Treasury attempted to have a provision inserted making community property a part of the gross estate." Of course the opinion in the case of MOFFITT v. KELLY (218 U.S. 400) had been written and published in 1910, whereas the opinion of the Honorable Attorney General was dated October 9, 1924, and published somewhat later; yet MOFFITT v. KELLY is not mentioned as being inconsistent with the conclusions reached in WARDELL v. BLUM, supra, and also expressed in

the opinion of the Attorney General, despite the fact that it is now one of the cases primarily relied upon by this Court in its decision of the present case.

The opinion in the case of MOFFITT v. KELLY, supra, was also written by CHIEF JUSTICE WHITE, and in view of his familiarity with the laws of his native state and of community property states generally, he was very careful in that opinion to emphasize the right of state courts to determine the character of the wife's interest in community property and its taxability under state law and state constitutions. The opinion in that case contains the following statement:

> "As there was State power to tax, so far as the Constitution of the United States was concerned, the question of whether or not the wife's interest under the circumstances was *correctly subjected* to the tax was a purely State question, not involving any violation of the Constitution of the United States, and which, therefore, we have no right to review, * * * since the nature and character of the right of the wife in community for the purpose of taxation was peculiarly a local question."

It is difficult to understand how this exposition and defense of state rights could furnish the basis for the present decision in "*considering those principles which must govern the incidence of a Federal Taxing Statute upon a subject matter which is the creation of State law.*" This is equally true whether the opinion in MOFFITT v. KELLY be construed (as contended by the Government and suggested in the footnote to the opinion of this Honorable Court in the present case) to deal with the rights of the wife in California as though they had been absolutely *vested property rights*, as distinguished from *vested rights later to receive property* upon death of the husband without other disposition. Cer-

tainly in any event the case cannot be taken as authority for the proposition that the *wife's estate* could have been similarly taxed upon the whole *in the event that she predeceased her husband*, a question not determined there but sought to be determined in the present case.

It is noted that in the case of POE v. SEABORN (282 U.S. 101), involving the application of The Federal Income Tax to community income, reference is made in Footnote 3 to the fact that the opinion of the Honorable Attorney General, above referred to, dealt only with the Estate Tax, but the reference thereto was embraced in certain references to opinions of the other Attorneys General who had passed on the income tax question, and it is presumed that MR. JUSTICE STONE disqualified himself in that case, and in the other related income tax cases from community property states, on account thereof.

As early as 1917 the Treasury Department had ruled that the Federal Estate Tax did not subject the whole community estate to the tax either directly, or as a measure of the tax, even where the husband predeceased the wife. (TREASURY DECISION 2450.) In that decision the distinction between the application of the Federal Estate Tax to community property in Texas as distinguished from its application to joint tenancies or tenancies by the entirety was pointed out by the following statement:

> "If, under the Texas law, property conveyed to a husband or wife during their marriage is taken by each *in entirety*, and in such a manner that it could not be contended that any specific part belonged to either, but that *each was the owner of all*, and upon the death of either no new interest or title vested in the survivor, as is the case in some States, the government, under a strict and technical interpretation of Paragraph C, of Section 202, would perhaps be justified in demanding that the

> whole of the property thus owned be included as a portion of the gross estate of the decedent."

Certainly no one could say that under the community property law of Texas "each was the owner of all, and upon the death of either no new interest or title vested in the survivor," even if the survivor took the whole instead of his or her one-half. On the other hand this can certainly be said of joint tenancies and estates by the entirety existing in the common law states, and also of such community interests as those wherein the wife has a mere "expectancy" as found to exist under the California laws (prior to their amendment in 1927) in the decisions in the cases of UNITED STATES v. ROBBINS (269 U.S. 315), and MOFFITT v. KELLY (supra), regardless of dictum embraced therein as to what might transpire if the wife had a "vested interest."

In the case of POE v. SEABORN (supra), this Honorable Court said:

> "In the Robbins case, we found that the law of California, as construed by our own Courts, gave the wife a mere expectancy * * * ."

The opinion in that case points out that Congress had undertaken on several occasions to pass a law taxing community income to the spouse having management and control of the community property, and it was apparently on the same basis that Congress was asked by the Treasury Department in 1921 to include community property in the gross estate, as mentioned in the opinion of the Honorable Attorney General rendered in 1924 and previously quoted from. It therefore cannot be said that Congress did not know how to frame and adopt legislation taxing community property according to the existence or the passing of the power

of control and management; yet those elements are not mentioned in the 1942 Amendment here involved, which this Honorable Court has held to be constitutional solely upon the theory that the tax is based upon those elements.

In this connection we point out further that in adopting the 1942 Amendments to the estate tax law and the gift tax law, Congress only dealt with the elements of control or management in two instances involving community property. The first instance was under Section 811(e)(4), where reference was made to the inclusion in both estates of insurance policies where the husband was manager of the community, this being designated as one of the "incidents of ownership," sought to be reached under that law. The second instance was under Section 1000(d), where a gift tax was sought to be presumptively imposed upon the husband only, by a provision that gifts of community property "shall be *considered* to be gifts of the husband" except as to those portions over which the wife usually has the *management and control,* such as her earnings and her rents and revenues from separate property of the wife.

It seems to us, therefore, that it requires judicial legislation to make the Federal Estate Tax Amendments of 1942 applicable to the cessation of control upon the husband's death, or the cessation of restraint upon his alienation by reason of the wife's death. Even if such action by the Court were permissible in the instance of statutory construction where the Statute involved was ambiguous, it would not appear to be within the realm of established procedure where, as here, the Statute is clearly mandatory as to the inclusion of the community estate, without any exception that is based upon the control or restraint of either spouse upon the property. Certainly, in any event, such a construction should not be placed upon the 1942 Amendments when it is clear that Congress was fully aware of the possibility of

taxing income or corpus according to the existence or absence of the elements of control and management and disposition. Not only had Congress theretofore considered the taxing of community income on that basis, but it is evident that it included certain insurance in the gross estate by reason of that element and taxed the gift of community property to the husband only, on such basis, excepting only that property over which the wife presumably had control.

The House Committee Report after referring to the alleged "preferential treatment" of community estates as set forth in Footnote 12 of this Court's opinion herein, included the following statement;

> "Your Committee seeks to remedy this situation by providing that such property is includable in the gross estate *of the husband* unless it can be shown to have been received as compensation for personal services actually rendered *by the surviving wife*, or derived originally from such compensation or other separate property *of the surviving wife*."

However, that statement is not embraced in the Court's footnote, but instead reference is there made to the Senate Finance Committee Report. That report contains no such statement as that quoted above from the House Committee Report, but on the contrary entirely omits any reference to husband or wife as such, and only refers to the "decedent and surviving spouse" and says that the law excepts from the tax only "such portion of the community property which is economically attributable to the survivor." Both reports conclude with the following statement:

> "The Statute establishes a uniform Federal Rule for apportioning the *respective contributions* of the spouses regardless of varying local rules of apportionment. State

presumptions are therefore not operative against the Commissioner."

It is perfectly obvious from the foregoing that the true intent of Congress, if such can be considered in any respect to ameliorate the harsh provisions of the Statute as written, was to avoid if possible the *presumption* that all community property was equally earned as well as equally owned, and to permit instead a *determination* as to the "respective contributions of the spouses." It is further obvious that Congress did not realize that under the State laws much community property is accumulated that cannot be attributed solely to either spouse separately and alone, and that, therefore, the exception of the surviving spouse's compensation for personal services, and rents and revenues from such spouse's separately owned property, would not equitably distribute the burden of the tax.

In any event the tax, as construed by the Court, is levied upon events occurring upon the death of either spouse and not upon the acts of or manner of acquisition by either spouse. Certainly "economic attribution" is not an excisable event. Furthermore, economic attribution or contribution is by no means the equivalent of "economic interest." The words "economic interest" as used in the Court's opinion in the instant case and in WHITNEY v. TAX COMMISSION, 309 U.S. 530, as quoted, must refer to a valuable interest or right in the property, or "an equitable interest in the res," as stated in HELVERING v. O'DONNELL, 303 U.S. 370.

If there is no shift of an economic interest at the death of the decedent spouse, there can be no basis for the application of the Federal Estate Tax except in the instance of transfers that may have been made in contemplation of death or intended to take effect in possession or enjoyment at death. On this account, it was held by this Honorable Court

in the case of REINECKE v. NORTHERN TRUST COMPANY, supra, that the Statute would be construed in a manner that would avoid the grave question of constitutional law, which would have arisen if the five trusts wherein the Settlor had reserved powers of management had been held includable in the gross estate of the decedent. In the present case, the Court recognizing this rule of statutory construction and constitutional interpretation, has apparently undertaken to find a reason and a basis for the tax not stated in the law nor contemplated by the Congress. Certainly, this is true as to the *hypothetical* case of the wife's estate which is considered by the Court because of the inseparability of the Statute. There is no basis reflected in the law or in the Committee Reports for the taxation of all community property as a part of the wife's estate, except the statutory ground of her predecease.

It would be interesting to know whether those members of the House and Senate who voted for the passage of the 1942 Amendment to the Federal Estate Tax Law and rejected an Income Tax Law Amendment seeking to tax all community income to the husband because he had control thereof, realized that they were passing a law which would be construed as turning entirely upon the element of control, instead of economic attribution. In any event, we feel sure that it would be startling to such members of Congress to know that the wife's estate would be taxed like the husband's, not because she had control of a part of the community, or testamentary power over a half of the community, or because she economically contributed to its acquisition by the community, but because her predecease "liberates her husband's share from the restrictions which the existence of the community had placed upon his control of it." They would be still more surprised to know that they were supposed to have brought about this result by taking

into consideration "personal and psychological forces which have great importance in the practical determination of how community property shall be managed by the husband. Though it may be impossible fully to translate these imponderables into legal rules * * *."

This Honorable Court, of course, recognizes that it could not "rest decision" on these "imponderables," and therefore emphasizes, in the opinion, events which necessarily result from the death of the wife such as the right of the husband, as to his half, to "partition and to hold it free of all controls." Exactly this same right would result to both spouses, without the death of either, by mere removal of the marital domicile and of the marital assets across a State boundary line, or even a mere investment of community funds in a common law state. In such instances the spouses would become absolute tenants in common with the right of each spouse as to his or her respective share to "partition and to hold it free of all control." Have state rights come to the point where even the selection of a different marital domicile is an excisable event, subjecting to taxation spouses who move from a community property state to a common law state, should Congress see fit to so prescribe.

The case of DEPAS v. MAYO, 11 Missouri 314, is one of the early authorities, that has never been challenged, establishing that courts of the new marital domicile under such circumstances will recognize that the spouses upon moving there become tenants in common as to all community property which they bring with them, and that even as to assets standing in the name of the husband but belonging to the community, he will be considered as trustee for the wife's one-half and immediately accountable as such. This rule is recognized in the AMERICAN LAW INSTITUTE'S RESTATEMENT OF CONFLICTS OF LAWS, Sections 292 and 293.

Even within the community property states the spouses

can become tenants in common, as to what was originally community property, without the decease of either spouse, as for instance in the case of divorce. Have the marriage and divorce laws of the states become so subject to Federal legislation that divorce may be treated by Congress as an excisable event, subjecting both spouses to a tax? Could divorce constitute a taxable event in community property states only, as contrasted with the common law states, without violating the uniformity clause of the Federal Constitution?

The right to partition certainly existed in the joint tenancy involved in the cases of UNITED STATES v. JACOBS, and DIMOCK v. CORWIN (companion cases), 306 U.S. 363. Yet the existence of that right was not considered sufficient to prevent the application of the tax. On the contrary it was the failure to exercise the right of partition, and the continuance of the joint tenancy until the death of one of the spouses, which was deemed to render the property taxable in the gross estate of the decedent. How, then, could the absence of a right to partition and the subsequent creation of such a right by death, change of domicile, divorce or otherwise be the basis of the application of the tax? Clearly, if the right to partition is what prevents the application of a similar tax to tenancies in common, and the absence of such right is what subjects the community property to the tax (at least so far as the wife's estate is concerned), then we must look for another basis to sustain the tax in the JACOBS case, and that basis is found in the "right of survivorship" which does not exist as to community property.

That same factor was the controlling factor in the case of TYLER v. UNITED STATES, 281 U.S. 497, even though it involved an estate by the entirety. The opinion of this Honorable Court in the present case recognizes this by stating that it was not the *source* of the property which was the basis

of the tax in either the TYLER or the JACOBS cases, but the existence of the estate by the entirety or joint tenancy at the time of the death of one of the spouses and the consequent "shift in economic interests" and "definite accession to the property rights" of the survivor. In other words, the survivor in those cases received property (not mere release from control or restraint), none of which (not even one-half thereof) would the survivor or his heirs or legatees have received if instead the decedent had been the survivor. Analogies can therefore not properly be drawn between the present cases and those cases on the ground that all of the cases involved "joint owners of property held in joint ownership." There is a vital distinction between "joint owners," such as were involved in the TYLER and JACOBS cases, and mere co-owners such as exist in the cases of community property and tenancies in common. There the joint owners were owners, each of the whole. Here the co-owners were owners, each of an undivided half interest in the whole.

Immediately preceding the discussion of the uniformity clause in its application to the present cases, the Court's opinion says that it is:

> "The *shifting at death* of the incidents of the property regardless of origin, which is the subject of the tax."

But, upon passing to discussion of the uniformity clause, the Court says:

> "The Amendment *taxing community property interests* is applicable throughout the territory of the United States wherever such interests may be found."

We cannot reconcile these two statements of the Court, nor

can we reconcile the second statement with the next statement appearing under the discussion of the Appellant's contention that the tax was in effect a direct tax on community property interests. That statement reads as follows:

> "An excise tax, which the Constitution requires to be uniform, laid upon the *shifting at death* of some of the incidents of property, could hardly be thought to be a direct tax which must be apportioned."

The subject of the tax is either the "shifting at death of the incidents of the property" as said by the Court in discussing the Fifth Amendment, as well as the "direct tax" contention; or the subject of the tax is "community property" as said by the Court in discussing the Uniformity requirement of the Constitution.

The Court has clearly demonstrated that it sustains the Act under the Fifth Amendment solely on the ground of the shifting of the elements of control and restraint. Those elements exist with reference to property rights in many if not all of the States of the Union, and the Uniformity Clause therefore requires that those elements be taxed similarly "in every place where the subject of it is found." Even in the case of tenancies in common, each tenant has the right to make use of the *whole* property so long as he does not commit waste, and only a partition in life or at death can defeat this right. It will not do to say that even if discrimination exists between the treatment of community property and of tenancies in common this is no violation of the Fifth Amendment or the Fourteenth Amendment, and therefore such discrimination cannot be considered as a violation of the Uniformity Clause. The very purpose of that clause was to prevent discrimination, at least between the States, and in that sense to blend with the Tenth Amend-

ment in the preservation of State rights. If the Court will never apply the Uniformity Clause, except where States or sections of the Nation (such as East, West, North or South), or sections of a State (for instance, one of the five States into which, under the Texas Annexation Resolution, Texas might be subdivided at its option) are enumerated, Congress can always obviate the Clause, as the Court seems to think Congress has succeeded in doing here.

We take it that at least a majority of the Court recognized that A could not be taxed with the property of B, nor his tax measured by the inclusion of B's property and that for this reason also the Court dealt with the so-called taxable incidents arising upon the death of the wife, as well as of the husband, and the resulting "new set of relationships with respect to his share of the community as well as hers." KNOWLTON v. MOORE, 178 U.S. 41, is cited at least twice in the opinion of the majority, and no question is raised about the principle announced there as well as in HOEPER v. TAX COMMISSION, supra. From the case of KNOWLTON v. MOORE, we quote as follows:

> "It may be doubted by some, *aside from express constitutional restrictions*, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those *fundamental conceptions of free government which underlie all constitutional systems.*"

The opinion of this Honorable Court in the instant case, as distinguished from the case of FERNANDEZ v. WIENER, from Louisiana, proceeds upon the assumption that the laws of the two states, relating to community property, are sub-

stantially the same in ultimate effect, and cites the case of HOPKINS v. BACON (282 U.S. 122) as establishing the wife's "restraint" on the husband's "control." HOPKINS v. BACON clearly established that equal ownership of community property existed in the Texas spouses. The same ruling was made in each of the four income tax cases simultaneously submitted and decided by this Honorable Court, involving the community property laws of Texas, Louisiana, Arizona and the State of Washington. However, the opinion in the Louisiana case, involving the income tax, states that "this case is probably the strongest of those presented to us, in favor of the wife's ownership of one-half of that income," and as illustration thereof adds: "While the husband is the manager of the affairs of the marital partnership, the limitation upon the wrongful exercise of his power over community property are *more stringent* than in many states which have a community system." The Court then points out that in Louisiana under certain circumstances the wife may bring about an immediate "dissolution and liquidation of the community property," and "an accounting from the husband for community income or property."

In Texas the wife has no right to a partition of the community property (which would amount to an immediate dissolution and liquidation thereof) nor any right to an accounting during the continuance of the marital relation. This is why the Texas Statutes expressly provide for such relief in the event of a divorce suit.

Apparently the Government preferred to submit the case of a wife's estate in Texas under the 1942 Amendment, in the form of a *moot case* as here presented, instead of an actual case which was first presented to the Government by counsel in this case, as the basis for the first test of the validity of those amendments. The Government saw fit in its brief in this case (as distinguished from the Louisiana

case) to review some of the circumstances that led to the selection of this as the test case from Texas, and preparation of the stipulation of facts entered herein. (Appellant's brief, page 16.) The Government did not, however, see fit to refer to the fact that it had refused to permit a test as to the wife's estate *either in advance of this case or contemporaneously* therewith. Fortunately there is record evidence of this in the case of W. M. CASTLEBERRY, INDEPENDENT EXECUTOR OF THE ESTATE OF TILLIE CASTLEBERRY, DECEASED, v. W. A. THOMAS, COLLECTOR OF INTERNAL REVENUE, No. 1396, Civil Docket of the District Court of the United States, for the Northern District of Texas, Dallas Division. The judgment entered therein in the month of April, 1945 (the same month and about the same time that the Government filed this appeal in this Honorable Court) shows that an agreed judgment was entered for refund to the plaintiff of the amount as claimed in the plaintiff's petition, by which a tax calculated on the whole community exceeded the amount of the tax calculated on the wife's half thereof. The petition also shows that all of the property involved was community property, and that none of it had been received as compensation for personal services actually rendered by either the said Tillie Castleberry or W. M. Castleberry (her husband), or from the separate estate of either. This precludes any contention that the husband's half of the community was excluded from the gross estate as coming within the exception of the statute pertaining to the survivor's contribution as now defined. The only grounds for recovery stated in the petition were not based on the existence of the exception in the Statute, but upon the specifically alleged invalidity of the Statute under the Federal Constitution, at least as applied to the wife's Estate. The grounds of invalidity stated in that petition are substantially the same as those asserted herein

under the various articles of the Federal Constitution and Amendments thereto.

We further point out that Texas has a Constitutional provision defining the wife's property, as distinguished from that of her husband. It has been held in ARNOLD V. LEONARD, supra, that this definition of the wife's property is restrictive and prevents attributing to the wife anything acquired after marriage except property received by her through "gift, devise or descent." The same Constitutional provision also requires that laws be passed defining "the rights of the wife" not only in relation to her separate property, but also that "held in common with her husband." This Honorable Court points out that no law has been passed in Texas, as in Louisiana, prescribing any statutory restraint in favor of the wife, against the husband's control of the property "held in common."

The Texas Constitutional provision above referred to is set forth in full on page 114 of our original brief in this Court. The same provision appeared in the Texas Constitution of 1845, 1869, and 1876 (the present Constitution). In each of these Constitutions there also appeared two other relevant provisions, substantially the same as first embraced in the Constitution of 1845, except that the reference therein was to the laws of the State of Texas instead of the Republic of Texas. In addition to Section 19 of Article VII (which is the same as Article 16, Section XV of the CONSTITUTION OF 1876, as quoted on page 114 of our brief), we quote the following from the Texas Constitution of 1845:

> "Article VII, Section 20:
>
> "*The rights of property* and of action which have been acquired under the Constitution and laws of the Republic of Texas, *shall not be divested;* nor shall any rights or action which have been divested, barred, or declared null and void by the Constitution and laws of the Re-

public of Texas, be reinvested, revived or reinstated by the Constitution; but the same shall remain precisely in the situation which they were before the adoption of this Constitution.".

"Article 13, Sec. 2:

"All laws and parts of laws now in force in the Republic of Texas, which are *not repugnant* to the Constitution of the United States, the *Joint resolutions for annexing Texas to the United States,* or to the provisions of this Constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof."

These sections correspond substantially, as aforesaid, to Section 18 of Article 16, and Section 48 of the same Article, of the CONSTITUTION OF 1876.

The joint resolutions for annexing Texas to the United States, referred to in the last quoted provision, were the joint resolution adopted by the Congress of the Republic of Texas on June 23, 1845 (GAMMEL'S LAWS OF TEXAS, Volume 2, page 1225) and the joint resolution adopted by the Congress of the United States in the same year (9 STATUTES AT LARGE, p. 108). Those resolutions prescribe that as a condition to admission to the Union, Texas should adopt a Constitution and submit it for the approval of the United States. The Constitution was submitted and approved with the provisions above stated, and it thus appears that the sovereign nations were blended, each undertaking to respect marital rights and property rights of their respective citizens, as then existing. Surely neither sovereign had in mind that it was delegating to the other the power to destroy; on the contrary by contemporaneous action they were asserting the right to preserve.

But, says this Honorable Court:

> "It has long been settled that an act of Congress, which on its face purports to be an exercise of the taxing power, is not any the less so because the tax is burdensome or tends to restrict or *suppress* the thing taxed. In such a case it is not within the province of Courts to inquire into the unexpressed purposes or motives which may have moved Congress to exercise a power constitutionally conferred upon it."

If this be the rule, then the delegated power to tax is indeed the power to destroy, and the Republic of Texas virtually committed suicide as to the rights it sought to preserve at the time of the annexation in (to use the words of this Honorable Court) "a defined property interest created by State Law, having a common historical origin, a common name, and constituting a universally recognized distinct class of property interest." While the language just quoted is used by the Court in justifying a separate classification of community property rights, in order to subject them to Federal taxation, this would seem only to indicate the Court's view that the power to classify furnishes an unlimited field for what is to be subjected to the power to destroy by taxation. Furthermore, if the intent to destroy the community system because of the alleged discrimination or "preferential treatment" in its favor is not evident from the report of Congress (as we believe it is) and if, as stated in the section of the Court's opinion last quoted, the Court cannot inquire into the "unexpressed purposes or motives" of Congress, we wonder whether the Court is justified in attributing unexpressed purposes or motives to Congress as the basis of supporting the tax, even where it is plain that Congress had no such intent.

If the Court were seeking a statutory construction that would uphold the law, it could give the excepting clause of the 1942 Amendment an interpretation broad enough at least to insure that in a case (such as the instant case from

Texas) where the community estate is found to have been accumulated solely from the joint efforts of the spouses and not from the separate earnings or property of either alone, only one-half of the community estate could be subjected to the tax. This construction is suggested by Charles B. Collins in his recent work entitled "Community Property and Taxes." The author in his comments on page 58 of his original work, with reference to the constitutionality of the Amendment suggested such a rule of construction based on the fact that the wife is "regarded by the law as participating in, and contributing to, the acquisition of all the marital earnings and accumulations." In his later supplement he refers to the pendency of the test cases from Texas and Louisiana, and says:

> "Both cases concern community property that was such in and at its inception. * * * The words 'compensation for personal services actually rendered' do no more than express a basic assumption of the law that the wife, equally with the husband, contributes to the acquisition of community property (Succession of Wiener, 203 La. 649, 14 So. (2d) 475). So read, Section 811(e)(2) harmonizes with the scheme of the Estate Tax Law and the intent of Congress, as expressed in the Report of the House Ways and Means Committee."

In support of this broad construction of the words "personal earnings" or "compensation for personal services," the author cites the Texas case of KERR v. TYLER GUARANTY STATE BANK, 33 S.W. 601, and cases discussed therein, and also refers to the interpretation of the words "earned income" in connection with the repealed provision for an earned income credit.

But if control is to be made the test rather than ownership or economic contribution, is it legal control or actual control that has been read into the minds of Congress? Is

it "legal control" of the paralyzed husband who is unable to exercise it, or actual control of the willing wife who assumes the responsibilities and exercises the control of necessity? Is it the control of the rancher who sells the cattle, or of the wife who sells the chickens and eggs? In the latter instance is the one any more in control than the other, and is either in control of all? And, when the power to control is changed by statute, even if legal control must be considered alone, does the burden of the tax shift with the change of the State law on account of an element that is not named in the Federal law?

Our Texas Courts are in some confusion as to whether the wife controls her earnings, as well as the rents and revenues from her separate property. HAWKINS v. BRITTON STATE BANK, 122 Tex. 69, 52 S.W. (2d) 243. CHANDLER v. ALAMO MANUFACTURING COMPANY, 140 S.W. (2d) 918; POTTORFF v. J. D. ADAMS COMPANY, 70 S.W. (2d) 745 (writ refused by the Supreme Court of Texas). Nevertheless the Statute excepts from the gross estate of a decedent spouse the earnings of the survivor and the revenues from the survivor's separate property. The exception is, as the Court recognizes, merely based on economic contribution of the surviving spouse. Is it not logically necessary, therefore, to assume that the impact of the tax is rested upon the same basis, even if the Court can look beyond the plain wording of the Statute which imposes the tax "to the extent of the interest therein *held as community property by the decedent and surviving spouse*"—not "to the extent of the interest controlled by the decedent."

The case of MOFFITT v. KELLY, supra, involved primarily the application of the contract clause of the Federal Constitution (Article 1, Section 10) to State Statutes of California which sought to impose a tax upon a surviving wife's

share in the community property, as though she had inherited it. The question was also raised as to the application of the Fourteenth Amendment through the "equal protection clause" therein contained, but in the words of MR. JUSTICE WHITE "the latter contention is in substance *but an incident*, and the former is the *fundamental proposition* counted on to procure a reversal."

The application of both sections of the Federal Constitution was denied on the ground that the wife did not have such a *vested* "right to possession and enjoyment" as to prevent the State from having the power to levy the tax.

The Court did not undertake to construe the State Statute, but held that the construction of the Statute was purely a matter for the State Court, saying:

> "But, for the purpose of enforcing the Constitution of the United States, we are not concerned with the mere *designation* affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been *mistakenly* brought within the state taxing law. * * * To make this, if possible, clearer by an illustration, we say that our view just expressed as to the operation and effect of the Constitution of the United States upon the tax in question would not be in the slightest degree changed, although it were to be hypothetically conceded that, on an analysis of the Constitution and laws of California concerning the community between husband and wife, in force at the time of the marriage of the Moffits, we should conclude that the nature and character of the rights of the wife in the community property, *if correctly interpreted*, were such that, on the death of the husband, the share coming to the wife would not be liable to taxation under a taxing law like the one under consideration."

In dealing with the incidental contention as to the equal

protection clause of the Fourteenth Amendment, the Court said:

> "The contention pressed in argument as to the equal protection of the law clause substantially denies the right of the state to impose any tax on the share of the wife in the community property, resulting from the termination of the community by the death of the husband, or in substance assumes that we have the right to review the action of the state court in deciding that the tax law which it enforced was *applicable*."

The opinion of the California Supreme Court which, on this basis, was affirmed by the Supreme Court of the United States, shows that the wife in California at that time had merely "a mere expectancy" in the community property, even though it was

> "so vested in her that the husband cannot deprive her of it by his will nor voluntarily alienate it, for the mere purpose of divesting her of her claim to it."

In this connection, the Court said:

> "She had rights which may be loosely described as 'vested,' in the sense that the person to whom the rights belonged was not doubtful or uncertain, but positive and known. In this sense only were her rights vested, but those rights never amounted to an estate."

The California Court cited a Louisiana case in support of its ruling (BOYER'S SUCCESSION, 36 La. Ann. 506). It should be noted that the Louisiana Supreme Court in the case of MARSHALL'S SUCCESSION, 118 La. 212, 42 So. 778, held that the Louisiana wife's usufruct was not subject to a similar tax (even though it was defeasible by the will of the deceased husband). Of course, the Texas Court has held

similarly as to the wife's community interest in Texas. (JONES v. STATE, 5 S.W. (2d) 973.)

The California Court further pointed out that the taxing statute "is presumed to have been enacted in the light of such judicial decisions as have a direct bearing upon it." Naturally, the construction in any event must be one which "is at least reasonably possible." REINECKE v. NORTHERN TRUST COMPANY, supra.

Appellees recognize that this Court, as Congress, was led to the justification of the validity of the tax, here involved, upon the grounds that the system of community property creates a tax advantage over the non-community property states. Of course, a complete answer is that the Union took Texas, as well as most of the other eight states, with the community system now in vogue, and if the Union did not like it at that time, then was when its abrogation should have been insisted on, not now.

But returning to the alleged tax advantage, while the persons that gave such information to Congress as is referred to in the concurring opinion, undoubtedly were sincere, for all practical purposes it was founded on a misconception due to the inability to get the true facts as to what extent taxes have been saved in other States, because of each spouse being separately taxed on what each owns. Our brief fully sets out how by removing the wife's disabilities under the Common Law, the husband's estate has been diminished and the wife's increased. Such removal also enables the wife to diminish her estate and increase that of her husband.

It is a matter of common knowledge, that everywhere in the other states, the wealthy spouse takes legitimate steps to increase the wealth of the other at the expense of the wealthier one; such as gifts, particularly of higher yield holdings; taking trades or ventures, particularly the so-called "sure shots," in the name of the other; allowing the more

profitable end of joint ventures to go to the other; partnerships; absorption of all of the family and business expense; intermingling; etc., so that in the course of a married lifetime, the fortunes of the spouses are largely equalized. Thus, all arguments of tax advantage are founded on a fallacy.

Conclusion

In an able address before the Supreme Court of Texas, when a "Nine-Judge Court" was recently installed, the President of the State Bar of Texas, Hon. John H. Bickett, Jr., who named the Committee of lawyers presenting this case here, referred to the glorious history and tradition of our community property system and to the fact that when the Republic of Texas and the State of Texas adopted the common law of England in other respects, they were careful to preserve the community system to govern marital rights. (Referring to GAMMEL'S LAWS OF TEXAS, Vol. 2, page 177, and Vol. 3, page 77.) That was before the decision of this Honorable Court in this case, and we suggest that little did he or the Bench and Bar of Texas expect that the system would now or ever be relegated to the role of a "relic of a by-gone age."

Finally, it is apparent that Congress never conceived that it had the power to tax which is granted it by the Court's opinion, and certainly that it never intended to exercise such a power, particularly in a case in which the wife was the first to die. Instead, Congress, assuming the unreality of the wife's ownership in community property (which reality this Court has repeatedly recognized, and now recognizes), attempted to levy the same sort of tax that would have been levied had the the spouses lived in a non-community property State, in an effort to prevent what Congress called "discrimination." The Court disregards Congressional intention and upholds and requires a system of taxation which will grossly discriminate

against the citizens of community property States and will, in innumerable cases, wipe out the accumulations of married persons in those States whenever the first spouse dies. All of this, we respectfully submit, justifies and requires a re-examination and reversal of this Court's holding.

We therefore respectfully urge the granting of this petition for rehearing and reversal of this Court's judgment, or in the alternative the submission and reargument of this test case before a full Bench.

The Attorney General of the State of Texas joins herein and adopts this petition as amicus curiae.

Respectfully submitted,

GROVER SELLERS,
Attorney General, State of Texas
(Amicus Curiae);

BOYLE, WHEELER & GRESHAM;

BAKER, BOTTS, ANDREWS & WHARTON;
HUTCHESON, TALIAFERRO & HUTCHESON;

THOMPSON, KNIGHT, HARRIS, WRIGHT & WEISBERG;

WEEKS, BIRD & CANNON,

Of Counsel

MARK V. FUCHS,
New Braunfels, Texas
(Attorney for Administrator);

RUPERT N. GRESHAM,
San Antonio, Texas;

PALMER HUTCHESON,
Houston, Texas;

J. PAUL JACKSON,
Dallas, Texas;

HARRY C. WEEKS,
Fort Worth, Texas
(Estate Tax Committee of Texas State Bar),

Attorneys for Appellee

January 25, 1946

We hereby certify that the above and foregoing petition for rehearing is filed in good faith, and not for delay.

MARK V. FUCHS,
RUPERT N. GRESHAM,
PALMER HUTCHESON,
J. PAUL JACKSON,
HARRY C. WEEKS,
Attorneys for Appellee

p. 2.

SUPREME COURT OF THE UNITED STATES.

No. 59.—October Term, 1945.

The United States of America, Appellant, *vs.* Henry Rompel, Jr., Administrator De Bonis Non Cum Testamento Annexo of Ernst Herbst, Deceased.	Appeal from the District Court of the United States for the Western District of Texas.

[December 10, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

This is a companion case to No. 58, *Fernandez* v. *Wiener*, decided this day. The Commissioner of Internal Revenue, proceeding under § 811(e)(2) of the Internal Revenue Code, 26 U. S. C. § 811(e)(2), as amended by § 402 of the Revenue Act of 1942, 56 Stat. 798, has levied, and appellee has paid, an estate tax on the termination of a Texas marital community by the death of the husband, a domiciled resident of Texas, the tax being measured by the value of the entire community property. All of the constitutional questions raised here were presented and decided in *Fernandez* v. *Wiener*.

Appellee, decedent's Administrator, brought this suit under the Tucker Act, 28 U. S. C. § 761-765, to recover as an alleged overpayment so much of the estate tax paid as is attributable to the inclusion in decedent's gross estate of the value of the wife's share of the community property.

The facts found by the district court were stipulated and are not in dispute. Decedent, a resident of Texas, was married February 12, 1901, and died on November 17, 1943, leaving him surviving his wife, their child, and grandchildren. From the date of the marriage until 1934 decedent's principal activity was that of raising livestock on a ranch in Texas, acquired largely on credit, and paid for out of savings from the ranching business. Other savings from the business were invested from time to time. After 1934 he received rent from the ranch property and income from loans and investments accumulated out of savings. During

the marriage neither decedent nor his wife was ever employed by any one at a wage or salary, and neither received any commissions, fees or similar compensation for personal services rendered. At the time of decedent's death the community property consisted of the original ranch property, investments acquired from savings from the ranch business, rentals and other income from investments.

In the estate tax return for decedent's estate only one-half of the value of the community property was reported. The Commissioner included the full value of the community property in the decedent's gross estate, and assessed a deficiency accordingly, which appellee paid. In this suit which followed, the district court gave judgment for appellee, 59 F. Supp. 483, holding that the tax violated the due process clause of the ~~Fourteenth~~ Fifth Amendment and the command of Article I, § 8 that "all Duties, Imposts and Excises shall be uniform throughout the United States." The Court found it unnecessary to pass on other constitutional contentions presented.

The case comes here on direct appeal under § 2 of the Act of August 24, 1937, 50 Stat. 751, 28 U. S. C. § 349a, appellant assigning as error the district court's ruling that the tax violates the due process clause of the Fifth Amendment and the uniformity clause of Article I, § 8 of the Constitution, and the district court's failure to hold that the tax is constitutional.

Community property has been recognized and defined by the laws of Texas throughout its history.* Its laws governing community property interests are similar in most respects to those of Louisiana described in our opinion in the *Wiener* case, *supra*. On the death of the husband, in Texas, as in Louisiana, the wife's share of the community is freed from the restrictions of his exclusive management and control, and the wife acquires exclusive possession and enjoyment of the property constituting her share, as well as important new powers of control and disposition over it. On the death of the wife, her share passes to her heirs, and his share is freed from the limitations which the existence of the community places on his control of community property. While Texas does not have the statutory restrictions on gifts which are to be found in the Louisiana Civil Code, Texas does place some limitations on the husband's power to make gifts of community

* Speer, Law of Marital Rights in Texas (1929) p. 409 *et seq.*

property. As we said of Texas community property in *Hopkins v. Bacon*, 282 U. S. 122, 126, the authorities hold "that if the husband, as agent of the community, acts in fraud of his wife's rights, she is not without remedy in the courts. (*Stramler* v. *Coe*, 15 Tex. 211; *Martin* v. *Moran*, 32 S. W. 904; *Watson* v. *Harris*, 130 S. W. 237; *Davis* v. *Davis*, 186 S. W. 775.)" Appellee also concedes that "excessive and capricious donations are void," and that malicious or fraudulent intent need not be established in order that the wife shall have the remedies referred to. Appellee does not question that these are the rules generally applicable to community property in Texas.

The death of either the husband or the wife of the Texas community thus effects sufficient alteration in the spouses' possession and enjoyment and reciprocal powers of control and disposition of the community property as to warrant the imposition of an excise tax measured by the value of the entire community.

For the reasons fully stated in our opinion in the *Wiener* case we conclude that the tax amendment of § 811 of the Internal Revenue Code authorizing the tax as applied in this case is not open to any of the constitutional objections which have been raised against it either here or below. The judgment is accordingly

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice Black and Mr. Justice Douglas concur in the result for the reasons stated in the concurring opinion of Mr. Justice Douglas in case No. 58, Joachim O. Fernandez, United States Collector of Internal Revenue, appellant, v. Samuel G. Wiener et al.